

FILE COPY

Office - Supreme Court, U. S.

FILED

JAN 20 1943

CHARLES ELMORE COOPLY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

**NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
and STROMBERG-CARLSON TELEPHONE MANUFAC-
TURING COMPANY,**

Appellants,

v.

**UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.**

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

**BRIEF FOR APPELLANT STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY**

✓ **E. WILLOUGHBY MIDDLETON,**
*Solicitor for Stromberg-Carlson Tele-
phone Manufacturing Company.*

Of Counsel:
THOMAS H. MIDDLETON.

INDEX

PAGE

Statement	1
Argument	3
Conclusion	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR APPELLANT STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY**

Statement

This is a suit for an injunction whereby appellant Stromberg-Carlson Telephone Manufacturing Company, Woodmen of the World Life Insurance Society, and National Broadcasting Company, Inc. (hereinafter referred to as

NBC) seek to enjoin the Federal Communications Commission from enforcing an order of the Commission on the ground that the Commission lacks power to make the order and that the order is arbitrary and capricious. Appellants Stromberg-Carlson Telephone Manufacturing Company and Woodmen of the World Life Insurance Society are each licensed operators of single radio broadcasting stations affiliated with the nationwide network of NBC. The order complained of purports to regulate the contractual arrangements existing between the NBC network organization and the individual broadcasting stations affiliated with said network, including appellants Stromberg-Carlson Telephone Manufacturing Company and Woodmen of the World Life Insurance Society.

The brief for appellant NBC contains a statement fully setting forth the facts in this case, and is incorporated herein by reference, in order to avoid unnecessary repetition. This appellant, however, desires to call the Court's attention to certain facts relating primarily to this appellant.

This brief is not intended to cover argument on the legal issues involved in these proceedings, such arguments having been fully and ably presented in the brief filed on behalf of NBC, and this appellant hereby adopts such arguments as its own, in order to avoid needless repetition. This brief is intended rather to present to this Court the very difficult position in which this appellant finds itself as a result of the order promulgated by the Commission in regard to network affiliation contracts.

Stromberg-Carlson Telephone Manufacturing Company (hereinafter referred to as Stromberg-Carlson) is a corporation organized and existing under the laws of the State of New York, having its principal place of business in the City of Rochester, New York. It is the owner and operator of the 50,000 watt standard broadcasting station WHAM located at Rochester. It has been licensed to operate and

has in fact operated that station since 1927, having acquired it by purchase from the prior owner and operator.

The Federal Radio Commission, since 1927, and the Federal Communications Commission, since 1934, have granted to Stromberg-Carlson successive renewals of its license to operate this station and successive increases in power, upon appropriate findings that the public interest, convenience and necessity would thereby be served.

WHAM is an absolutely independent station, being owned and controlled exclusively by this appellant. Since 1927, it has been affiliated with NBC in nationwide network broadcasting.

Argument

When the hearings involved in these proceedings were first instituted before the Commission in 1938, pursuant to Order No. 37, Docket No. 5060, it is true that all the independent broadcasting stations of this country—about 900 in number—were notified that the hearings were to begin and were offered an opportunity to present testimony. However, these notices gave no intimation whatever that the Commission proposed to take any action to nullify network affiliation contracts. Stromberg-Carlson assumed that these hearings, and any orders, rules or regulations which might result therefrom, would be limited to technical matters of broadcasting. It had no idea that its network affiliation contract would be affected by these hearings, and accordingly took no part in them. It presented no testimony, and was not even represented at a single hearing.

These affiliation contracts have been entered into in good faith, and have been performed in good faith for a period of more than fifteen years. We honestly maintain that they are perfectly valid. Certainly they have never been adjudicated to be invalid. And yet the Commission, by a

mere order, has presented to Stromberg-Carlson the alternative of giving up either its broadcast license or its affiliation contract, each of which constitutes a *sine qua non* of effective broadcasting. We respectfully submit that Stromberg-Carlson has not had its day in court on the question of the validity of these contracts.

The statutory court, in its opinion (R. 522, 529), seems to assume that the affiliated stations would prefer to be more free of the networks than they are. Certainly Stromberg-Carlson does not agree with this assumption. Its position is that the terms of these affiliation contracts grant to the affiliated stations as much freedom as is consistent with the practical necessities of efficient network broadcasting. As to the provisions for option time, Stromberg-Carlson heartily endorses the sentiments expressed by the dissenting Commissioners to the effect that

“* * * without them the situation would be analogous to a railroad in which each station-master along a *through route* had adequate power to make his own train schedules for through trains”. (Report, R. 159)

In other words, without the option time clause national networks would be unable to schedule programs for national advertisers, who supply the money for the networks and the stations. Stromberg-Carlson remembers only too well the chaotic condition which existed in the early 1930s, before it had such an agreed provision with its network. Its position in this case was stated in a preliminary way by the affidavit of Mr. Hanover, Vice-President of Stromberg-Carlson, in support of the application for a temporary injunction (R. 259-62). This affidavit points out the chief terms of this extremely valuable contract. Stromberg-Carlson desires to continue its option granted to the network for the limited number of hours during each day, because that arrangement represents a nice balance between the necessities of a national network and the ability of WHAM to supply local needs.

Stromberg-Carlson also views with apprehension the possibility in the future of being unable to receive from the network, free of charge, the magnificent sustaining programs supplied in the past. This is because the fine network programs, both sustaining and commercial, have built up WHAM's listening audience, thereby making it a more valuable outlet for the sale of its own time locally. Like its competitors, the newspapers and magazines, it must depend on the size of its circulation—its listening audience.

It is Stromberg-Carlson's contention that its affiliation contract is a valid contract governing business practices, that this contract does not violate the Anti-Trust Laws, and that if there be any question in this regard, such illegality can be established only by the final judgment of a court having jurisdiction, in a proceeding to which Stromberg-Carlson is a party. We agree with the contentions and legal arguments advanced by the networks that the Commission did not have the power to regulate business practices, and accordingly that the order of the Commission purporting to do so is invalid.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that Court for the issuance of a permanent injunction against the enforcement of the Commission's order which is the subject of these proceedings.

Respectfully submitted,

E. WILLOUGHBY MIDDLETON,
Solicitor for Stromberg-Carlson
Telephone Manufacturing Com-
pany.

Of Counsel:

THOMAS H. MIDDLETON